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James N. Hatten, Clerk
By: AMCarter Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

LIFT MEDIA, LLC,
Plaintiff

v.

GREATER THAN GATSBY, LLC,
Defendant

CIVIL ACTION NO.
1:14-CV-3470-ODE

ORDER

This copyright infringement case is before the Court on Plaintiff Lift Media, LLC's Motion for Partial Summary Judgment [Doc. 107]. For the reasons stated below, Lift's Motion for Partial Summary Judgment [Doc. 107] is DENIED.

I. Procedural History

This case arises out of an oral agreement between Lift and Gatsby for Lift to provide Gatsby with website consulting, construction, and optimization services. Lift's Amended Complaint [Doc. 35], which was filed June 22, 2015, alleged six causes of action: (1) declaratory judgment of copyright ownership, (2) copyright infringement, (3) misappropriation of trade secrets, (4) unjust enrichment, (5) abuse of process, and (6) alter ego [Id.]. The Amended Complaint brought claims against Gatsby, its Chief Executive Officer Joshua Hohweiler, and Does 1-10 [Id.]. In an Order filed August 14, 2015 ruling on a Motion to Dismiss by Defendants [Doc. 34], the Court dismissed the misappropriation, abuse of process, and alter ego claims, and dismissed Does 1-10 [Doc. 38]. As a result of dismissing the alter ego claim, which was the only claim against him, Hohweiler was also dismissed as a defendant [Id.]. On

April 25, 2016, Lift filed a Motion for Leave to File a Second Amended Complaint [Doc. 92], which the Court denied [Doc. 118]. Thus, Lift currently has live claims against Gatsby for declaratory judgment of copyright ownership, copyright infringement, and unjust enrichment.

On June 16, 2016, Lift filed a Motion for Partial Summary Judgment [Doc. 107].[1] In its Motion, Lift seeks summary judgment on its claims for declaratory judgment of copyright ownership and copyright infringement [Id. at 1]. On June 22, 2016, Gatsby filed a Response in Opposition [Doc. 122]. On July 6, 2016, Lift filed a Reply [Doc. 130]. Accordingly, this Motion is now ripe before the Court.

II. Facts

The following material facts are not in dispute unless noted. Lift is a Georgia LLC, and Gatsby is a Texas LLC [Doc. 122-1, *Def's Resp. to Movant's Stmt. of Mat. Facts*, at 2-3]. Gatsby is a purported owner of Photoshop actions and Lightroom presets, which simplify the processing of photos within Adobe software [Id. at 3]. There was an oral contract between the parties [Id. at 5-6]. As part of the contract, Lift used the Gatsby website to sell Gatsby's photography add-ons [Id. at 7-8]. Lift provided this service from November 8, 2013 to June 25, 2015 [Id. at 9-10]. From November 8, 2013 to May 31, 2015, Gatsby paid Lift a 20% share of revenues from Gatsby's website sales [see id. at 11-12]. Lift was an independent contractor of Gatsby [Doc. 130-1, *Pl's Resp. to Def's. Stmt. of Addt'l. Mat. Facts* at 2-3].

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[1]Lift's Motion was addressed to its Second Amended Complaint, as its Motion for Leave to File the Second Amended Complaint was then pending before the Court; however, Lift did note that, in the alternative, the Motion was proper in regard to the declaratory judgment and copyright infringement actions of its First Amended Complaint [Doc. 107-2 at 6 n.2]. Gatsby argued that the entire Motion for Partial Summary Judgment was moot, as the Court denied Lift leave to file the Second Amended Complaint, and Lift was trying to add claims the Court denied in denying leave [Doc. 122 at 4-6]. Lift conceded that the additional claims in its proposed Second Amended Complaint were not before the Court, but argued that the claims in its First Amended Complaint were properly before the Court for the purposes of its Motion for Partial Summary Judgment [Doc. 130 at 4-5].

The parties agree that Lift sent Gatsby a letter on June 5, 2016, but dispute what the letter required of Gatsby. Lift says the letter was a "Settlement Offer, Notice of Termination of E-Commerce Consulting Services, Notice of Copyright Infringement, and Cease and Desist letter . . . which required Defendant Gatsby to either license said intellectual property from [Lift] and execute a written independent contractor agreement for the provision of e-commerce consulting services or terminate all use of said intellectual property" [Doc. 35 ¶ 29]. Gatsby admits it received the letter, but doesn't agree with the duties Lift says the letter imposed [Doc. 40 ¶ 29]. Gatsby's counsel sent Lift a letter on June 26, 2015 notifying Lift of termination of the oral agreement, and on the same day, Gatsby launched an ostensibly new website to which its domain greaterthangatsby.com was directed [Doc. 122-1 at 12]. Gatsby and Hohweiler did not solely author some of the website content, and did not contribute at all to other website content [Id. at 18-19].[2] There is no written evidence that Hohweiler exclusively authored or

[2]These admissions regarding co-authorship and non-authorship were made as of January 6, 2016 [see Doc. 107-3 at 190]; however, it is not clear as of what date the website content being referred to was on the website [see e.g. id. at 118].

coauthored with Lift any website content; his contributions were made entirely via telephone [Id. at 20]. According to Hohweiler's testimony, at no time did Andrew Egenes or Robert Hash, Jr., managers of Lift, or Lift itself, assign or convey any interest in intellectual property by written agreement to Gatsby [Id. at 21].

Beyond those undisputed facts, the parties agree on very little. Gatsby contends that the oral agreement was entered into on September 27, 2013 [Doc. 122-2, *Def's Stmt. Of Addt'l Mat. Facts*, at 2], and was actually between Gatsby, Egenes and Hash, because Lift had not yet been organized under Georgia law [Doc. 122-1 at 2]. Lift contests the September 27 contract date, and disputes when Lift came into being [Doc. 130-1, *Pl's Resp. to Def's. Stmt. of Addt'l. Mat. Facts* at 4-5]. Lift contends that the agreement covered e-commerce consulting, but Gatsby says it covered more, including building a website for Gatsby, and devoting 100% of Hash and Egenes's time to the Gatsby website [Doc. 122-1 at 6].

The parties strongly dispute who owns the website [see e.g. id. at 3-5]. Further, while Lift makes claims about ordering and receiving deposits for its copyright of the website, which it says was registered November 17, 2014, Gatsby notes that it can neither affirm nor deny those claims because it has not yet received relevant discovery [Id. at 48-55]. Additionally, Gatsby objects to some of those claims as constituting hearsay [Id. at 53-55].

III. Legal Standard

A. Summary Judgment

The Court will grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex v. Catrett, 477 U.S. 317, 323 (1986) (citation omitted). "[T]he substantive law will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Only after the moving party meets this initial burden does any obligation on the part of the nonmoving party arise. Chanel, Inc. v. Italian Activewear of Fla., Inc., 931 F.2d 1472, 1477 (11th Cir. 1991). At that time, the nonmoving party must present "significant, probative evidence demonstrating the existence of a triable issue of fact." Id. If the nonmoving party fails to do so, the moving party is entitled to summary judgment. United States v. Four Parcels of Real Prop., 941 F.2d 1428, 1438 (11th Cir. 1991).

All evidence and justifiable factual inferences should be viewed in the light most favorable to the nonmoving party. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1532 (11th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ." Anderson, 477 U.S. at 255. However, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id. at 247-48 (emphases in original).

B. Copyright Ownership & Copyright Infringement

Under 17 U.S.C. § 201(a), "[c]opyright in a work . . . vests initially in the author or authors of the work." "As a general rule, the author [of a copyrighted work] is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection." Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989).

There are several exceptions to the rule that the author of the work owns the copyright on the work. First, a work for hire is considered to be authored by the person for whom the work was created, and that person owns the copyright unless otherwise agreed to in a written agreement signed by the parties. 17 U.S.C. § 201(b). A work for hire exists when: (1) the work is created by an employee working within the scope of employment, or (2) the work is one of a number of types of work, including a collective work or a compilation, if the parties agree in a written, signed document that the work is to be considered a work for hire. Id. § 101. "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works." Id. "A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." Id. Thus, a work can be a work for hire, in which case the author and copyright owner is the person commissioning the work unless: (1) the work is created by an employee in the scope of employment, or (2) the work is created by an independent contractor and a written, signed agreement provides that the work is to be considered a work for hire. Second, copyright ownership may be transferred, but only by operation of law, or in a writing signed by the copyright owner or his agent. Id. § 204(a).

Copyright can also be jointly owned. "The authors of a joint work are co[-]owners of copyright in the work." Id. § 201(a). "A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." Id. § 101. Inseparable and interdependent have been explained as:

> '[I]f author B's contribution when combined with author A's contribution results in recasting, transforming or adapting A's contribution, then the two contributions may be said to be inseparable. If the process is simply one of assembling into a collective whole A's and B's respective contributions, without thereby recasting A's contribution, then the two contributions may be said to be interdependent.'

M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1493 (11th Cir. 1990) (quoting 1 M. Nimmer and D. Nimmer, Nimmer on Copyright § 6.04 at 6-11 (1989)). To prove joint authorship, there must be intent for the work to be joint or the authors to be joint authors. Gordon v. Lee, No. 1:05-CV-2162-JFK, 2007 WL 1450403, at *8 (N.D. Ga. May 14, 2007) (King, Mag. J.) (citing Childress v. Taylor, 945 F.2d 500, 506-08 (2nd Cir. 1991; 17 U.S.C. § 101). There is a split among the Circuits, however, as to whether the component parts of a purported joint work must also be independently copyrightable for the work to be jointly authored. Gordon, 2007 WL 1450403, at *8. This District has held that:

> [a] joint author is not required to establish that his or her contribution to a work was independently copyrightable.

> Instead, a joint author claimant must show that he or she contributed to the work some original expression which became 'part of the finished expression' and that the contributors intended to be joint authors.

Id. at *9.

A plaintiff makes a prima facie case for copyright infringement by showing that: (1) plaintiff owns the copyright to the work, and (2) defendants copied protected parts of the work. Smith v. Casey, 741 F.3d 1236, 1241 (11th Cir. 2014) (citing Saregama India Ltd. v. Mosley, 635 F.3d 1284, 1290 (11th Cir. 2011)). Thus, if it is unclear whether plaintiff owns a copyright in the work, it would also be unclear whether defendant infringed plaintiff's copyright.

IV. Discussion

In its Motion for Summary Judgment, Lift seeks judgment that it is the sole author of the website and email template,[3] and that Gatsby has infringed on its copyrights [Doc. 107-2 at 7]. In support of its argument for summary judgment on the declaratory judgment claim, Lift argues that it was the sole author and owner of the website and email template, because it created the work, and the work was neither a work for hire, nor assigned to Gatsby [Doc. 107-2 at 8-9]. Lift further argues that Gatsby was not a joint author, and the website and template were not joint works, because Hohweiler's contribution was not itself copyrightable, and the parties did not intend their work to be merged into an inseparable whole [Id. at 9-20]. Because Lift was the sole owner of the website and template, and Gatsby copied them, Lift argues, it is entitled to summary judgment on the

[3] In its denied Motion for Leave to File a Second Amended Complaint, Lift sought leave to add claims against Gatsby stemming from alleged infringement of an email template [Doc. 84 at 8].

copyright infringement claim [Id. at 20-22]. In the alternative, should the Court find that Gatsby is a co-author, Lift argues that it is entitled to an accounting [Id. at 22-23].

In its Response, Gatsby first notes that Lift's First Amended Complaint limited the copyright infringement action to "Defendants having 'used, distributed, displayed, or reproduced Plaintiff's Copyright and attendant intellectual property from on or about November 8, 2013 through and including June 5, 2015 . . .'" without licensing it, or having paid Lift [Doc. 122 at 5, citing Doc. 35 ¶¶ 43-45]. Gatsby notes, however, that Lift's Motion seeks summary judgment in relation to three new matters: (1) the new website launched June 26, 2016 (four days after Lift's Amended Complaint was filed), (2) infringement of an email template, and (3) an alternative request for an accounting [Doc. 122 at 5-6]. All three of these issues, Gatsby argues, were considered and denied as amendments when the Court denied Lift's Motion for Leave to File a Second Amended Counterclaim [Id. at 6]. Gatsby further argues that the website was a work for hire, thus making Gatsby the owner [Id. at 6-9]. In the alternative, Gatsby claims, it could not have infringed because the website was assigned or licensed to it [id. at 10-14], or Gatsby had a fair use of the copyright [id. at 14-18]. Gatsby claims that it solely owns the copyrightable material [id. at 18], but notes that if Gatsby and Lift are co-authors, they cannot be liable to one another for copyright infringement [id. at 19-20]. Open-source code components used by Lift in building the website, argues Gatsby, further complicate ownership issues, and may make the website uncopyrightable [Id. at 20-21]. Finally, Gatsby argues, given that Lift had not yet been incorporated at the time of the Lift-Gatsby contract, the copyrightable material may have been created by Hash and Egenes, not Lift, which further muddies the issue of copyright ownership [Id. at 23-25].

In its Reply, Lift concedes that the claims it tried to add in its Motion For Leave to File a Second Amended Complaint are not justiciable [Doc. 130 at 4-5]. Lift then argues that, since both parties claim sole ownership of the website, the website is not a joint work, and there is no co-ownership of the website or website copyright [Id. at 5]. Lift says that the website is not a work for hire, and was not assigned to Gatsby [Id. at 5-8]. Lift continues by arguing that Gatsby cannot raise the affirmative defense of license for the first time in its Opposition [Id. at 9-11]. Finally, Lift argues that the website was not licensed to Gatsby, because Gatsby did not publish its own website until June 26, 2015, and any theoretical license Gatsby had was terminated by Lift's June 5, 2015 letter, if not earlier [Id. at 11-14]. In this section of its argument, Lift states: "the only infringement that is the subject of this lawsuit occurred from June 5, 2015 until June 26, 2015 when [Gatsby] adversely took the benefit of the Website over Plaintiff's protest" [Id. at 11].

The Court here finds that there are a number of genuine disputes of material fact which make it inappropriate to grant Lift's Motion for Partial Summary Judgment [Doc. 107]. First, it is unclear who created the website in question, and thus, under the Community for Creative Non-Violence rule, who would be the presumptive author of the website, and owner of the copyright. Both parties argue that they are the sole owner of the website, and the related website copyright. Lift argues that it is sole author because the website was neither a work for hire, nor assigned to Gatsby. Gatsby argues that the website was a work for hire, or was assigned or licensed to it, or that it made a fair use of the copyright.

Even assuming *arguendo* that the website was not a work for hire nor assigned to Gatsby because Lift was an independent contractor, and there was no written agreement between the parties, the website could still be a jointly authored work. This is particularly true under the Gordon rule, which requires only that the parties have intended a joint work, and that the party claiming joint authorship has contributed an original expression which became part of the whole. Although both parties here claim sole authorship, genuine disputes of material fact remain. For example, Lift manager Andrew Egenes, in correspondence with the U.S. Copyright Office on November 19, 2014, which Lift submitted as part of an exhibit, notes: "The website is currently being used in a **joint venture** and we are not claiming copyright to all the content that has been or is currently published on the website" [Doc. 107-3 at 276] (emphasis added). Egenes goes on to ask whether Lift can exclude (presumably from the copyright) portions of content on the website for which it is not the sole owner. Id. If the parties were part of a joint venture, and Gatsby contributed some expressions which became part of the whole website, arguably the website would be a jointly authored work. Adding to the genuine disputes of material fact, Gatsby has asserted that Lift has yet to comply with its discovery obligations, which included providing "[a] complete, true and correct copy of the source code related to the Lift Media platform and website as referenced in United States Copyright registration number TX 7-940-

849" [Doc. 122-3 at 2-3]. Without that discovery available, it remains unclear what exactly Lift authored, created, or co-authored.

Because there remain genuine disputes of material fact in relation to Lift's ownership of the website copyright, there are also genuine disputes of material fact in relation to Gatsby's alleged copyright infringement. As a result, summary judgment on the infringement claim would be inappropriate.

V. Conclusion

In conclusion, for the reasons detailed above, Lift's Motion for Partial Summary Judgment [Doc. 107] is DENIED.

SO ORDERED, this 13 day of October, 2016.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE